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No. 88-1553

In The

Supreme Court of the United States

October Term, 1988

JAMES G. RICKETTS, Director, Arizona Department of Corrections, and DONALD WAWRZASZEK, Superintendent of the Arizona State Prison,

Petitioners,

vs.

JOHN HARVEY ADAMSON,

Respondent.

On Writ of Certiorari To The Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS THE STATE OF IDAHO JOINED BY: CONNECTICUT, FLORIDA, MONTANA, NEVADA, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, WASHINGTON and WYOMING

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QUESTIONS PRESENTED FOR REVIEW

1. May a death penalty statute:

(A) Determine death eligibility by aggravating circumstances at the penalty phase?

(B) Require the defendant to prove the existence of mitigation by a preponderance of the evidence and to produce substantial mitigation to avoid the death penalty after aggravation has been proved?

(C) Utilize specific criteria, such as intentional or foreseeable infliction of physical pain or mental anguish, to satisfy the requirements of *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853 (1988)?

2. When a defendant breaches a plea agreement that provides for automatic reinstatement of the original charge in case of his breach, and because of the breach the state prosecutes him on the original charge, does a presumption of vindictiveness arise?

3. Is it arbitrary and capricious for the judge who accepted a plea to second degree murder and a stipulated sentence of years, to impose the death penalty after the defendant has breached the agreement and been prosecuted and convicted of the original charge of first degree murder?

TABLE OF CONTENTS

	Pages
INTERESTS OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
REASONS FOR GRANTING THE WRIT	4
I. The Decision of the Ninth Circuit Court of Appeals Conflicts With This Court's Decision in *Spaziano v. Florida*, 468 U.S. 447 (1984); *Gregg v. Georgia*, 428 U.S. 153 (1976); and *Godfrey v. Georgia*, 446 U.S. 420 (1980)	4
II. The Court of Appeals Holding That Arizona Improperly Placed a Burden of Proof on the Defendant Is Not Legally Supportable	11
III. The Court of Appeals Damaging Holding That Arizona's "Special Heinousness" Aggravating Factor Is Invalid as Applied Creates a Standard Different from What This Court's Cases Require	14
IV. The Decision of the Ninth Circuit Court of Appeals Contradicts This Court's Prior Holding in the Case	17
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

Pages

Furman v. Georgia, 408 U.S. 238 (1972) 5, 12

Godfrey v. Georgia, 446 U.S. 420 (1980) 4, 5

Gregg v. Georgia, 428 U.S. 153 (1976) 4, 12, 13, 14, 15

Johnson v. State, 438 S.2d 774 (Fla. 1983) 6

Jurek v. Texas, 428 U.S. 262 (1976) 12

Lockett v. Ohio, 438 U.S. 586 (1978) 11

Lowenfield v. Phelps, 484 U.S. —, 108 S.Ct. 346 (1988) 12

Maynard v. Cartwright, — U.S. —, 108 S.Ct. 1853 (1988) 5, 16

McMillan v. Pennsylvania, 477 U.S. 79 (1986) 7

McCleskey v. Kemp, 481 U.S. —, 107 S.Ct. 1756 (1987) 14

Patterson v. New York, 432 U.S. 197 (1977) 12

Poland v. Arizona, 476 U.S. 147 (1986) 10

Proffitt v. Florida, 428 U.S. 242 (1976) 12, 15

Roberts v. United States, 445 U.S. 552 (1980) 10

Spaziano v. Florida, 468 U.S. 447 (1984) 4, 5, 6, 7, 10

State v. Robert J. Bolton, No. 13677 (Conn. 1989) 16

State v. Charboneau, ##16339 and 16741 (Idaho S.Ct., April 4, 1989) 7

State v. McDougall, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865 (1983) 13

United States v. Grayson 438 U.S. 41 (1978) 10

Williams v. New York, 337 U.S. 241 (1949) 9, 10

Woodson v. North Carolina, 428 U.S. 280 (1976) 14, 16

Zant v. Stephens, 462 U.S. 862 (1983) 4, 15, 16

TABLE OF AUTHORITIES—Continued

Pages

STATUTES AND RULES

Ala. Code § 13A-5-47 8
Ala. Code § 13A-5-49(8) 14
Ariz. Rev. Stat. Ann. § 13-703(B) 7
Ariz. Rev. Stat. Ann. § 13-703(E) 11
Ariz. Rev. Stat. Ann. § 13-703(G) 11
Ariz. Rev. Stat. Ann. § 13-703(f)(6) 14
Ark. Stat. Ann. § 41-1303(8) 14
Cal. Penal Code § 190.4 8
Cal. Penal Code § 190.2(14) 14
Colo. Rev. Stat. § 16-11-103 8
Colo. Rev. Stat. § 16-11-103(6)(j) 14
Conn. Gen. Stat. § 53a-46a(h)(4) 14
Conn. Gen. Stat. § 53a-46a(b) 8
Del. Code Ann. § 4209(e)(1)(1) 14
Fla. Stat. § 921.141 ..... 7, 8
Fla. Stat. § 921.141(5)(h) 14
Fla. Stat. § 921.141(3) 6
Ga. Code Ann. § 17-10-31 8
Ga. Code Ann. § 17-10-31(7) 15
Idaho Code § 19-2515 7
Ill. Rev. Stat. Chap. 38, ¶¶ 9-1 8
Idaho Code § 19-2515(g)(5) 15
Ill. Rev. Stat. Chap. 38, ¶ 9-1(b)(7) 15

TABLE OF AUTHORITIES—Continued

	Pages
Ind. Code 35-50-2-9(d)	8
La. Code Crim. Proc., Art. 905.4(g)	15
Md. Ann. Code, Art. 27, § 413(b)(3)	8
Miss. Code Ann. § 99-19-101(5)(h)	15
Mo. Rev. Stat. § 565.032(7)	15
Mo. Rev. Stat. § 565.006	8
Mont. Code Ann. § 46-18-301	7
Neb. Rev. Stat. § 29-2520	7
Neb. Rev. Stat. § 29-2523	15
Nev. Rev. Stat. § 175.558	8
Nev. Rev. Stat. § 200.033(8)	15
N.H. Rev. Stat. Ann. § 630:5(a)(7)	15
N.J. Rev. Stat. 2c:11-3c(c)(4)(c)	15
N.M. Stat. Ann. § 31-20A-1(B)	8
N.C. Gen. Stat. 15A-2000(a)(9)	15
Ohio Rev. Stat. Ann. § 2929.03(c)(1)(b)	8
Okla. Stat. § 701.10	8
Okla. Stat. § 701.12(4)	15
Pa. Cons. Stat. 42 § 9711(b)	8
S.C. Code Ann. § 16-3-20(B)	8
S.D. Codified Laws Ann. § 23A-27A-1(6)	15
S.D. Codified Laws Ann. § 23A-27A-4	8
Tenn. Code Ann. § 39-2-204(b)	8
Tenn. Code Ann. § 39-2-203(i)(5)	15
49 USC 1473(c)(2)(C)	8

TABLE OF AUTHORITIES—Continued

	Pages
49 USC § 1473(c)(7)(B)(iv)	15
Utah Code Ann. § 76-5-202(1)(q)	15
Utah Code Ann. § 76-3-207	8
Wash. Rev. Code Ann. § 10.95.050(2)	8
Wyo. Stat. 36-2-102	8
Wyo. Stat. § 6-2-102(h)(vii)	15

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INTERESTS OF AMICI

The amici curiae states have capital punishment statutes that directly, or by the force of precedent, are affected by the decision of the Court of Appeals for the Ninth Circuit.

If *Adamson* is not reversed, all existing death sentences in Arizona, Idaho and Montana will be invalidated because they were not imposed by juries.

Moreover, the constraints placed on plea bargaining agreements by the court of appeals will make it extremely difficult for prosecutors in any death penalty state to give serious consideration to plea bargains that may be critical to the success of criminal prosecutions.

The court of appeals' ruling regulating the burden of proving mitigating circumstances contradicts this Court's cases and heightens the potential for arbitrariness in capital sentencing, especially in those states where the jury decides the sentence.

The holding that the "especial heinousness" aggravating factor was not narrowly applied, notwithstanding a history of state court construction of this provision of the statute, could affect the statutes of twenty-four states. *Adamson* creates a standard for subjective aggravating factors that goes beyond what is required to reasonably narrow sentencing discretion.

The decision of the court of appeals has an enormous adverse impact on the capital sentencing statutes of the states of the Ninth Circuit. The risk that the holding might be followed elsewhere should be a matter of considerable concern. The holding, for reasons explained herein, carries unlimited potential for introducing confusion and nonuniformity in every state with capital punishment statutes.

SUMMARY OF ARGUMENT

1. Statutory aggravating circumstances in a death penalty statute do not serve the same function as elements of the offense and cannot be regarded as elements. The

court of appeals' decision to the contrary, and its corollary principle that jury sentencing is required in capital cases, invalidates all the capital sentences now existing in Arizona, Idaho and Montana and casts doubt on the validity of provisions of the capital sentence laws of numerous other states. This result conflicts with this Court's decisions.

2. The court of appeals' holding that Arizona impermissibly transfers a burden to prove mitigation to the defendant, thus creating an impermissible "presumption of death," conflicts with this Court's decisions and lays the groundwork for reintroducing arbitrariness into capital sentencing decisions.

3. The court of appeals' treatment of Arizona's "especial heinousness" aggravating factor conflicts with this Court's precedent and the statutes of twenty-four states. The standard of objectivity imposed by *Adamson* on an aggravating factor previously approved by this Court would make it nearly impossible to narrow this factor by construction. The mischief-making potential of *Adamson* is already beginning to be felt outside the Ninth Circuit.

4. The court of appeals' holdings that enforcement of a plea agreement this Court previously approved created a presumption of vindictiveness and that the sentencing judge acted arbitrarily by enforcing the agreement, violate the law of the case. The decision is a substantial interference with a prosecutor's power to enter into plea bargain agreements.

Note: The State of Connecticut joins with respect to the issues raised by the first question presented for review by petitioners.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Ninth Circuit Court of Appeals Conflicts With This Court's Decision in Spaziano v. Florida, 468 U.S. 447 (1984); Gregg v. Georgia, 428 U.S. 153 (1976); and Godfrey v. Georgia, 446 U.S. 420 (1980).

A majority of a limited en banc panel in *Adamson v. Ricketts* took the view that pegging the death penalty to a system of statutorily defined aggravating circumstances converts what was designed to be a basis for penalty enhancement into a set of elements of what the court judicially defined as an offense of "capital murder." From this, the court reasoned that, because the aggravating factors were in fact elements of the offense, the defendant was entitled to a jury trial for the determination of sentencing factors. The premise is flawed.

A conspicious distinction between the functions of trial and sentencing proceedings was overlooked in *Adamson*. The application of statutory aggravating circumstances to facts is attended by an element of discretion not present in the trial of guilt or innocence. If the trial jury finds that the state has proved a first-degree murder, as the offense is defined in the law, it has no *legal* discretion to acquit the defendant merely because it thinks there are extenuating circumstances. In such cases the jury has a legal obligation to convict and is so instructed. At sentencing, however, the finding of a statutory aggravating circumstance does not legally compel a death sentence. Instead the sentencing court must go on to consider mitigating factors and may decide not to impose the death penalty in light of them. *See, Zant v. Stephens*, 462 U.S. 862 (1983). The distinction refutes the reasoning of the court of appeals.

The cases requiring the development of statutory aggravating circumstances were decided on Eighth Amendment grounds. *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Godfrey v. Georgia*, 446 U.S. 420 (1980). The theory was that the death penalty was cruel and unusual punishment when it was imposed arbitrarily. The function served—narrowing discretion—was a sentencing function, not a definitional function. More recently, in *Maynard v. Cartwright*, — U.S. —, 108 S.Ct. 1853 (1988), the Court held that claims of vagueness concerning aggravating circumstances are decided on Eighth Amendment grounds, not the notice requirements of the due process clause of the Fourteenth Amendment. Thus, the sentencing factors are part of an Eighth Amendment requirement to narrow discretion and were not intended to secure at sentencing all of the benefits afforded by the due process clause or, by implication, the Sixth Amendment.

The *Adamson* majority disposed of this Court's opinion in *Spaziano v. Florida*, 468 U.S. 447 (1984), by holding that it was not controlling "as it left untouched the question of the right to a jury trial where the aggravating circumstances of a state's death penalty statute are elements of a capital offense." 865 F.2d at 1029. As the Court saw it, "*Spaziano* was limited to the constitutionality of judicial 'sentencing' and the evaluation of 'the appropriate punishment to be imposed.'" 865 F.2d at 1028. Thus, according to *Adamson*, this Court "never reached the particular contention Adamson has raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the sixth amendment." 865 F.2d at 1011.

The Court of Appeals reads *Spaziano* incorrectly. This Court, in response to counsel's argument in *Spaziano* addressed the "fundamental premise" that "the capital sentencing decision is one that, in all cases, should be made by a jury." 468 U.S. at 458. The Court went on to point out that although a capital sentencing proceeding may be like a trial in some respects significant under the double jeopardy clause, "there is no similar danger involved in denying a defendant a jury trial on the sentencing issue of life or death." 468 U.S. at 459. Accordingly, the Court held that a capital sentencing proceeding addresses the same issue involved in any other sentencing proceeding: a determination of the appropriate punishment to be imposed. The Court explicitly stated that "the Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue." *Id.* The Court seems clearly to have predicated its decision on the Sixth Amendment in response to an argument calling the Sixth Amendment right to a jury trial a fundamental premise of capital sentencing.

Moreover, it is worth pointing out that the Florida statute that was before the Court in *Spaziano* contained substantially the same provisions the Adamson Court found to be indicia of "elements of capital murder." The Florida statute requires the sentencing judge to make written findings. Fla. Stat. § 921.141(3). Florida law requires that aggravating circumstances be found beyond a reasonable doubt. *Johnson v. State*, 438 S.2d 774 (Fla. 1983). The statute states what facts must be proved in aggravation, that aggravating factors must be established at an adversarial hearing, that at least one aggravating factor must be found, and that if an aggravating factor is found mitigating circumstances must be sufficient to outweigh the

aggravation, thus shifting to the defendant the same burden as does the Arizona statute considered by the Adamson majority. Fla. Stat. § 921.141. The process described by the Florida statutes plainly requires the same "subjective and complex inquiries into the defendant's state of mind before, during and after the perpetration of the crime," *Adamson*, 865 F.2d at 1026, as does the Arizona statute and the statutes of Alabama, Idaho, Montana, and Nebraska.

This Court's decision in *Spaziano* necessarily disposed of the question whether the Sixth and Fourteenth Amendments were violated by a statutory scheme like that enacted in Arizona and did so contrary to the holding of the *Adamson* decision. *Cf., McMillan v. Pennsylvania*, 477 U.S. 79 (1986) ("There is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact. . .").

The conflict between *Spaziano* and *Adamson* has been noted by the Idaho Supreme Court, which refused to follow *Adamson* and observed in *State v. Charboneau*, Nos. 16339 and 16741, April 4, 1989, that it was convinced that in *Spaziano this* Court "inherently considered and rejected the premise of the Ninth Circuit in *Adamson:* that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment." Slip op. at 31.

Arizona, Idaho, Montana, and Nebraska have statutes providing that sentencing in capital cases will be conducted by the trial judge without jury participation. Ariz. Rev. Stat. Ann. § 13-703(B); Idaho Code § 19-2515; Mont. Code Ann. § 46-18-301; Neb.Rev.Stat. § 29-2520.

Other states provide that the participation of the jury in capital sentencing proceedings shall be advisory only. *See, e.g.*, Ala. Code § 13A-5-47; Fla. Stat. § 921.141.

Numerous jurisdictions provide, under varying circumstances, for waiver of a sentencing jury in capital cases or for sentencing by the court alone where a guilty plea has been entered. Cal. Penal Code § 190.4; Colo. Rev. Stat. § 16-11-103; Conn. Gen. Stat. § 53a-46a(b); Ga. Code Ann. § 17-10-31; Ill. Rev. Stat. Chap. 38, ¶¶ 9-1; Ind. Code § 35-50-2-9(d); Md. Ann. Code, Art. 27, § 413(b)(3); Mo. Rev. Stat. § 565.006; Nev. Rev. Stat. § 175.558; N.M. Stat. Ann. § 31-20A-1(B); Ohio Rev. Stat. Ann. § 2929.03(c)-(1)(b); Okla. Stat. § 701.10; Pa. Cons. Stat. 42 § 9711(b); S.C. Code Ann. § 16-3-20(B); S.D. Codified Laws Ann. § 23A-27A-4; Tenn. Code Ann. § 39-2-204(b); 49 USC 1473 (c)(2)(C); Utah Code Ann. § 76-3-207; Wash. Rev. Code Ann. § 10.95.050(2); Wyo. Stat. 36-2-102. A large majority of capital sentencing states clearly have not accepted the proposition that capital sentences are somehow deficient if a jury has not participated in the sentencing decision.

Moreover, it is not at all clear that the *Adamson* decision would allow the "right" to a jury determination of the elements of "capital murder" to be waived. The *Adamson* majority avers that death sentencing decisions require heightened scrutiny of Sixth Amendment factors to avoid "the unchecked power of the government to execute at will." 865 F.2d at 1023. One suspects that the court of appeals might not find it permissible for a capital defendant to pass the last barrier between him and "the unchecked power," even voluntarily. The majority opinion argues that "there must be strict separation of deter-

minations of guilt or innocence (factfinding) and determinations of the appropriate punishment (sentencing)" because "to otherwise blur the distinctions between those concepts would result in the ultimate tyranny . . ." *Id.* This sweeping overvaluation is the springboard for the court's own effort to blur the distinction between trial and sentencing by its holding that customary sentencing concerns overlap questions of guilt and innocence.

The court of appeals' position that aggravating factors are elements of the offense and must be decided by a jury potentially affects the capital sentencing statutes of thirty states which reserve the determination of these factors for a separate penalty phase proceeding in a capital case. *See*: Appendix D, Petition for Certiorari. If the court of appeals is correct, the determination of aggravating factors is part of the process of resolving the defendant's guilt or innocence. It follows that aggravating factors must be proved during the guilt phase of the proceeding where the jury will decide whether the state has proved the "elements" of "capital murder." Not only does the Adamson holding conflict with the statutory plans noted above, but it is irreconcilable with this court's prior sentencing decisions. If the aggravating factors must be proved at the guilt phase, what becomes of evidence ordinarily admissible at the time of sentencing but not on the issue of guilt or innocence? The objectives of trial and sentencing proceedings are different. At trial, care must be taken to exclude information about those aspects of the defendant's character and background which might influence the jury to believe that he was guilty of the crime charged merely because he was a generally evil person. *Williams v. New York*, 337 U.S. 241 (1949). At the time

of sentencing however, much of the same information about those aspects of the defendant's character and background which must be *excluded* at trial must be *considered* at sentencing if the court is to make a well-informed decision about what disposition to make of the offender. *Cf., Roberts v. United States*, 445 U.S. 552 (1980) (the sentencing judge's inquiry is largely unlimited either as to the kind of information which may be considered or its source); *United States v. Grayson*, 438 U.S. 41 (1978).

The court of appeals has either presumed to overrule these cases and intends to limit the sentencing authority to only that evidence which would currently be admissible at trial, or else it proposes to permit the introduction in the guilt phase of such things as evidence of the defendant's past criminal conduct, his perjury at trial, *Grayson, supra*, and unresolved charges of criminal conduct, *Williams, supra*. Either consequence of the *Adamson* opinion is inconsistent with this court's cases.

The impact of the decision on Arizona, Idaho and Montana cannot be overstated. The capital sentencing laws of these states have been largely undone and more than one hundred death sentences invalidated. The potential effect of such a precedent on states that permit non-jury sentencing in some circumstances is a matter of serious and widespread concern. Federal courts following *Adamson* will deny these states the right to structure their capital sentencing laws as they see fit, in almost certain violation of this Court's admonition in *Spaziano, supra*, that there is no one correct way to structure a death scheme as long as the appropriate narrowing factors are included. *See, Poland v. Arizona*, 476 U.S. 147 (1986). The intrusion on a state's right to define crime is substantial.

II.

The Court of Appeals Holding That Arizona Improperly Placed a Burden of Proof on the Defendant Is Not Legally Supportable.

The Arizona statute provides that the court shall impose a sentence of death if statutory aggravation is proved and "there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann., § 13-703(E). Mitigating factors may be anything relevant to extenuate the offense, whether of record or proffered by the state or the defendant. Ariz. Rev. Stat. Ann., § 13-703(G).

The court of appeals found that the statute impermissibly placed upon the defendant a burden to prove sufficient mitigation, "thereby imposing a presumption that death is the appropriate penalty." 865 F.2d at 1039. It also held that the restriction to relevant evidence contained in § 13.703(G) precluded sentencing courts from considering all "pertinent" mitigating evidence, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), and related cases.

The court of appeals' view that a statutory scheme requiring the defendant to bear a burden of persuasion is the equivalent of a presumption of death would, if followed elsewhere, invalidate provisions of the death sentencing enactments of at least ten states. See Appendix E, Petition for Certiorari.

The court of appeals' decision not only has the potential for widespread adverse effect on state sentencing statutes, it conflicts with this Court's sentencing decisions.

Capital punishment statutes enacted by various states in response to this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), employ several distinct sentencing procedures. *See, Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Lowenfield v. Phelps*, 484 U.S. —, 108 S.Ct. 346 (1988). The Court has held that a capital sentencing scheme is constitutionally sufficient if it "narrows the class of death eligible murders and then at the sentencing allows for consideration of mitigating circumstances and the exercise of discretion." *Lowenfield v. Phelps*, 484 U.S. at 108. A state is entitled to assign the defendant a burden of persuasion or a burden of going forward with evidence, as the Court explained in *Patterson v. New York*, 432 U.S. 197 (1977):

> [The Supreme Court] should not lightly construe the Constitution so as to intrude upon the administration of justice by individual states . . . [I]t is normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of production of evidence and the burden of persuasion. . . . If the state . . . chooses to recognize a factor that mitigates the degree of criminality or punishment . . . , the state may assure itself that the fact has been established with reasonable certainty. 432 U.S. at 201, 209.

The court of appeals has stated that the Arizona statute

> deprives the sentencer of the discretion mandated by the constitution's individualized sentencing requirement . . . because in situations where the mitigating and aggravating circumstances are unbalanced, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court

> from imposing a sentence less than death and thus precludes the individualized sentencing required by the constitution. *Adamson*, 865 F.2d at 1043.

The analysis effectively demands that there be no evidentiary standards to guide the sentencing authority in its consideration of mitigating circumstances. This is particularly significant for those states that place the responsibility for sentencing in the hands of a jury. In North Carolina, for example, the sentencing jury must unanimously find beyond a reasonable doubt that at least one statutory aggravating factor is present. It must then find the existence of mitigating factors by a preponderance of the evidence, weigh aggravation against mitigation, and then determine unanimously and beyond a reasonable doubt whether the aggravating factors found, as diminished by the mitigating factors, are sufficiently substantial to warrant the imposition of the death penalty. *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865 (1983).

The *Adamson* decision places no limit on the kind of evidence that may be considered in mitigation and precludes the state from holding the defendant to any kind of burden of persuasion. This resolution substantially diminishes the objectivity of the sentencing process.

The sentencing authority's discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action," *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), while allowing the sentencing authority to give "particularized consideration of relevant aspects of the character and a record of each defendant before imposition upon him of a sentence of death."

Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Neither goal is undercut by requiring the defendant to prove the facts underlying a factor in mitigation to the satisfaction of the sentencing authority. The application of binding evidentiary standards is an integral part of the capital sentencing structure of jury sentencing states and promotes reliability and uniformity among cases in the jurisdiction. The absence of clear evidentiary standards on finding mitigating factors would allow jurors to indulge in whim or caprice on the basis of speculative evidence to spare a defendant. While individual decisions to grant mercy are not unconstitutional, *Gregg v. Georgia, supra*, uniform evidentiary standards which bind all juries in all cases help to avoid disparate results in capital cases. *See, McCleskey v. Kemp*, 481 U.S. —, 107 S.Ct. 1756 (1987).

III.

The Court of Appeals Damaging Holding That Arizona's "Special Heinousness" Aggravating Factor Is Invalid as Applied Creates a Standard Different from What This Court's Cases Require.

Most states with capital sentencing statutes employ some variation of the statutory aggravating factor that authorizes the death sentence if the crime was "especially heinous, cruel, or depraved," or was "outrageously or wantonly vile, horrible or inhuman." Ala. Code § 13A-5-49(8); Ariz. Rev. Stat. Ann. § 13-703(f)(6); Ark. Stat. Ann. § 41-1303(8); Cal. Penal Code § 190.2(14); Colo. Rev. Stat. § 16-11-103(6)(j); Conn. Gen. Stat. § 53a-46a(h)(4); Del. Code Ann. § 4209(e)(1)(1) ("outrageously or wantonly vile, horrible or inhuman . . ."); Fla. Stat.

§ 921.141(5)(h); Ga. Code Ann. § 17-10-30(7) ("outrageously or wantonly vile, horrible, or inhuman . . . "); Idaho Code § 19-2515(g)(5); Ill. Rev. Stat. Chap. 38, ¶ 9-1(b)(7) ("exceptionally brutal or heinous behavior indicative of wanton cruelty" toward a child); La. Code Crim. Proc., Art. 905.4(g); Miss. Code Ann. § 99-19-101(5)(h); Mo. Rev. Stat. 565.032(7) ("outrageously or wantonly vile, horrible or inhuman . . . "); Neb. Rev. Stat. § 29-2523; Nev. Rev. Stat. § 200.033(8) ("torture, depravity of mind or the mutilation of the victim"); N.H. Rev. Stat. Ann. § 630:5(a)(7); N.J. Rev. Stat. 2c:11-3c(c)(4)(c) ("outrageously or wantonly vile, horrible or inhuman . . . "); N.C. Gen. Stat. § 15A-2000(a)(9); Okla. Stat. § 701.12(4); S.D. Codified Laws Ann. § 23A-27A-1(6) ("outrageously or wantonly vile, horrible or inhuman . . . "); Tenn. Code Ann. § 39-2-203(i)(5); 49 USC § 1473(c)(7)(B)(iv); Utah Code Ann. § 76-5-202(1)(q); Wyo. Stat. § 6-2-102(h)(vii).

The widespread use of the "especially heinous" and similarly subjective "outrageously vile" factors is doubtless attributable to the circumstance that this court invited the states to adopt these factors by its opinions in *Gregg v. Georgia, supra,* and *Proffitt v. Florida, supra,* which held that these or similar statutory aggravating factors were sufficient to narrow the discretion of the sentencing authority.

The court wrongly held in *Adamson* that careful efforts by the Arizona courts to narrow by construction the applicability of this factor to a limited class of cases was not good enough. The Constitution requires that discretion be reasonably narrowed, not that the result be utterly predictable. *Zant v. Stephens,* 462 U.S. 862

(1983). If the court of appeals' insistence on something like absolute predictability were accepted, the aim could only be fully realized by a mandatory sentencing scheme in which the court would not be allowed to consider the individualized effect of mitigation. Obviously this result is not permissible. *Woodson v. North Carolina,* 428 U.S. 280 (1976).

The dissenting judges in *Adamson* call attention to the manner in which the atrociousness factor has been applied in Arizona, pointing out that the cases in which this factor was found were consistently those easily recognizable as especially atrocious killings, readily separable from other first-degree murders. Any subjective factor must be based on somewhat subjective language as narrowed by the constructions given the language by state courts. This Court did not hold in *Maynard v. Cartwright,* — U.S. —, 108 S.Ct. 1853 (1988), or in any other case, that no element of subjectivity was permissible in the evaluation of aggravating factors. *See, Zant v. Stephens, supra.* The court of appeals comes close to this conclusion, however, by its rejection of a solid course of state interpretation of the meaning of the aggravating factor. In reliance on *Adamson,* a trial court in Connecticut has already invalidated that state's especial cruelty factor. *State v. Robert J. Breton,* No. 13677 (1989).

The states are in need of guidance at this point. The *Adamson* opinion suggests that an almost impossible standard of objectivity must govern the employment of a somewhat subjective aggravating factor, but that is not the tenor of this Court's prior decisions.

IV.

The Decision of the Ninth Circuit Court of Appeals Contradicts This Court's Prior Holding in the Case.

The court of appeals held that the death sentence imposed on Adamson after his breach of a plea agreement raised a presumption of prosecutorial vindictiveness and that the trial judge acted arbitrarily by imposing the death sentence after having previously concluded that a term of years would be an appropriate penalty.

The effect of the court's holding need not be belabored. No prosecuting attorney charged with enforcing a state's capital crime statutes would likely agree to a plea bargain if, as the court of appeals has effectively held, only the defendant could enforce its terms.

This court held in *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680 (1987), that the plea agreement, because it specified that the charges would be reinstated in the event of breach, was the precise equivalent of an agreement waiving the defense of double jeopardy, even though there was no specific provision that mentioned the double jeopardy clause. The court explained that an agreement to return the defendant to the *status quo ante* in case of breach would be meaningless if the defendant could violate the agreement and then rely on a double jeopardy defense to prevent enforcement. Precisely the same considerations govern claims of prosecutorial vindictiveness and judicial arbitrariness. If the defendant agreed to be returned to the *status quo ante* upon breach of the agreement, it follows that he agreed to waive these claims. That is a necessary implication of this court's prior decision in *Ricketts*. The court of appeal's decision violates the law of the case.

It at least contradicts the meaning of *Ricketts v. Adamson, supra.*

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CONCLUSION

This Court should grant certiorari on each issue proffered by the State of Arizona through its corrections director. *Adamson* conflicts with this Court's decisions in every particular and promotes principles of law which, if followed, could interfere substantially with every state's ability to devise and follow an effective capital sentencing scheme.

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